Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, Year 2000

HARRY D. JOHNSON

Petitioner,

v.

STATE OF TENNESSEE

Respondent.

On Petition for Writ of Certiorari
from the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether it is a violation of fundamental fairness and due process for a state court to instruct a jury that it may "weigh and consider the meaning of a sentence of imprisonment" in its determination of guilt or innocence.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Harry David Johnson, respectfully prays that a writ of certiorari issue to review the Judgment of the Supreme Court of Tennessee entered on September 11, 2000.

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OPINION BELOW

The Supreme Court of Tennessee denied petitioner's Permission to Review for Discretionary Appeal of the Tennessee Court of Criminal Appeals decision of May 17, 1999. [App. 1].

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STATEMENT OF JURISDICTION

Petitioner seeks a writ of certiorari from this Court to review the September 11, 2000 final Order of the Supreme Court of Tennessee [App. 2] denying Petitioner's Application for Permission to Review the Tennessee Court of Criminal Appeals decision of May 17, 1999 denying relief under the United States Constitution, Amendment XIV. [App. 3] The jurisdiction of this Court is accordingly pursuant to 28 U.S.C. § 1257.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV
United States Constitution, Amendment V

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STATEMENT OF THE CASE

Mr. Johnson respectfully petitions this Court for a writ of certiorari to review the denial of permission to review by the Tennessee Supreme Court of the Judgment of the Tennessee Court of Criminal Appeals.

Mr. Johnson's case presents a critical constitutional question as to the fairness of instructing a non-sentencing jury about the length of possible punishment and parole eligibility in a first degree murder case.[1]

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[1] Mr. Johnson's case should be distinguished from a death penalty case, wherein the jury in Tennessee is permitted, in a bifurcated sentencing phase, to weigh aggravators and mitigators and impose sentence. In this case, the role of the jury was to determine guilt or innocence, not sentence.

Harry David Johnson was a respected member of the Bristol, Tennessee community (where he owned and managed his own business, H. Johnson Pharmacy). Mr. Johnson worked as a pharmacist. As of June 1995, he was married to Katherine, and they had two college age daughters. Katherine suffered from severe alcoholism that had begun many years earlier when the girls were very young.

On June 21, 1995, Katherine Johnson was fatally shot by Mr. Johnson at the Johnsons' residence on Friendship Road. Mr. Johnson was arrested, taken into custody, and initially jailed without bond. Mr. Johnson was thereafter charged with the first degree murder of his wife.

The trial began on May 12, 1997, and centered around Mr. Johnson's state of mind. Throughout the trial, the record reflects that the prosecution pursued an aggressive theory of first degree murder, while the defense defended on a theory of voluntary manslaughter. The trial focused on whether Mr. Johnson had the requisite intent for first degree murder or the lesser degrees of culpability under the Tennessee homicide statute.

At the conclusion of the proof, the trial court instructed the jury on the offense of first degree murder and the lesser included offenses of second degree murder, voluntary manslaughter, reckless homicide, and of criminally

negligent homicide. Pursuant to the Tennessee "Truth in Sentencing" law, T.C.A. § 40-35-201(b) (1997)[2] (since

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[2] Tenn. Code Ann. § 40-35-201(b) provides, in relevant part:

(b)(1) In all contested criminal cases, except for capital crimes . . . upon the motion of either party, filed with the court prior to the selection of the jury, the court shall charge the possible penalties for the offense charged and all lesser included offenses.

(2)(A)(I) When a charge as to possible penalties has been requested pursuant to subdivision (b)(1), the judge shall also include in the instructions for the jury to weigh and consider the meaning of a sentence of imprisonment for the offense charged and any lesser included offenses. Such instruction shall include an approximate calculation of the minimum number of years a person sentenced to imprisonment for the offense charged and lesser included offenses must serve before reaching such person's earliest eligibility date.,,,

(ii) Such instructions to the jury shall also include a statement that whether a defendant is actually released from incarceration on the date when such defendant is first eligible for release is a discretionary decision made by the board of paroles based upon many factors, and that such board has the authority to require the defendant to serve the entire sentence imposed by the court.

amended 1998),[3] the prosecutor asked the court to inform the jury of "the possible penalties for the offense charged and all lesser included offenses." [App. 35] Over the objection of defense counsel [App. 36], the following instruction was read to the jury:

> **RANGE OF PUNISHMENT**
>
> The jury will not attempt to fix any sentence. However, **you may weigh and consider the meaning of a sentence of imprisonment.** The range of punishment for the crimes involved here is as follows:
>
> 1. If you find the defendant guilty of the offense of murder in the first degree, he shall receive a sentence of imprisonment for life. A defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least twenty-five (25) full calendar years of such sentence.

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[3] Recently amended to eliminate the ability of a trial court to instruct a non-sentencing jury on the ranges of punishment.

2. If you find the defendant guilty of the offense of murder in the second degree, the Court can fix a determinate sentence within a range of not less than fifteen (15) years nor more than twenty-five (25) years.

Whether a defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Parole and is based on many factors. The Board of Parole has the authority to require the defendant to serve the entire sentence imposed by the Court.

3. If you find the defendant guilty of the offense of voluntary manslaughter, the Court can fix a determinate sentence within a range of not less than three (3) years and not more than six (6) years.

Whether the defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Parole and is based on many factors. The Board of Parole has the authority to require a defendant to serve the entire sentence imposed by the Court.

4. If you find the defendant guilty of the offense of reckless homicide, the Court can fix a determinate sentence within a range of not less than two (2) nor more than four (4) years.

Whether a defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Parole and is based on many factors. The Board of Parole has the authority to require a defendant to serve the entire sentence imposed by the Court.

5. If you find the defendant guilty of the offense of criminally negligent homicide, the Court can fix a determinate sentence within a range of not less than one (1) year nor more than two (2) years.

Whether the defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Parole and is based on many factors. The Board of Parole has the authority to require a defendant to serve the entire sentence imposed by the Court.

[App. 57-59] (emphasis added).

Charged in this fashion, the jury returned a verdict of guilty of first degree murder.

Mr. Johnson appealed to the Tennessee Court of Criminal Appeals, raising, among other grounds, the federal and state constitutionality of this jury instruction and specifically, the part of the jury charge that instructed the jury that it might "weigh and consider the meaning of a sentence of imprisonment" in considering guilt or innocence.[4]

Prior to Mr. Johnson's direct appeal, the "Truth in Sentencing" instruction embodied in section 40-35-201(b) of the Tennessee Code Annotated ("§ 40-35-201(b)") had been the subject of several criminal appeals prior to 1998; however, it was not until February 1998, after Mr. Johnson's trial, that the Tennessee Court of Criminal Appeals specifically addressed the federal and state constitutionality

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[4] To comply with Rule 14(g)(i), Rules of the Supreme Court, this issue was: (1) raised on federal and state constitutional grounds initially by oral objection at the jury charging conference, [App. 35-36]; (2) raised on direct appeal on both federal and state constitutional grounds, and decided on both grounds, *State v. Harry Johnson*, 1999 WL 318830 (Tenn. Crim. App. May 17, 1999) [App. 3]; and (3) raised finally on both state and federal constitutional grounds in application for permission to review by the Tennessee Supreme Court, which was denied on September 11, 2000.

of the "weigh and consider" language in the statute and a jury charge that incorporated that language.

In *State v. Weiskopf*, No. 02C01-9611-CR-00381, 1998 WL 40672 (Tenn. Crim. App. Feb. 4, 1998) ("Weiskopf I"), the Tennessee Court of Criminal Appeals held that an instruction allowing a jury to "weigh and consider" sentencing information violated the due process clauses of both the state and federal constitutions because it allowed the jury to consider extraneous information, unrelated to guilt or innocence, when rendering a verdict citing *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). The *Weiskopf* court went on to state that:

> The sole function of the jury in this case was to determine guilt or innocence, not the length of imprisonment. In essence, this jury was specifically told they could consider extraneous information that had nothing whatever to do with guilt or innocence in arriving at their verdict. One accused of a crime is entitled to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial and not other circumstances not adduced as proof at trial.

Weiskopf I, at 5.[5]

A year later, in the present case, the Tennessee Court of Criminal Appeals reversed its previous holding in *Weiskopf* and approved the court's instruction to the jury that it could "weigh and consider" the range of punishment for three forms of homicides in its determination of guilt or innocence. *State v. Johnson*, 1999 WL 318830, at * 11-13 (Tenn. Crim. App. May 17, 1999) [App. 3]

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[5] Prior to the direct review of Mr. Johnson's case, the federal and state constitutionality of instructing the jury to "weigh and consider the meaning of a sentence of imprisonment" under T.C.A. § 40-35-201(b) was the source of conflicting decisions between the Tennessee Supreme Court and the Tennessee Court of Criminal Appeals. *Compare State v. King*, 973 S.W.2d 586 (Tenn. 1998) *with State v. Weiskopf*, No. 02C01-9611-CR-00381, 1998 WL 840000, at *3 (Tenn. Crim. App. Dec. 4, 1998). *See also State v. Nicholson*, No. 03C01-9901-CR-00035, 2000 WL 122244, at *5 (Tenn. Crim. App. Feb. 2, 2000) (holding "weigh and consider" instruction violated due process and claiming difference between "weigh and consider" and "for your information only" was NOT just an issue of semantics); *State v. Hale*, No. 01C01-9712-CR-00564, 1999 WL 280485, at *6 (Tenn. Crim. App. May 6, 1999) (comparing *King* with *Weiskopf II* and concluding that a "weigh and consider" instruction is unconstitutional because the jury should not consider *irrelevant* sentencing information).

Mr. Johnson thereafter timely filed an application for petition for review with the Supreme Court of Tennessee. During the pendency of this application, in June 2000, the Supreme Court of Tennessee re-addressed the issue in *State v. Nichols*, 24 S.W.3d 297 (Tenn. 2000). Reiterating its earlier determination that punishment and parole eligibility information is relevant to the determination of guilt or innocence, the Tennessee Supreme Court held that an instruction telling a jury that it could ***either*** "weigh and consider" ***or*** consider "for your information only" the range of sentence in a criminal trial passed both state and federal constitutional muster in informing jurors about the applicable range of punishment. Id. at 301. The Tennessee Supreme Court thereafter refused to grant Mr. Johnson's application for permission to review on any grounds. [App. 2]

REASON FOR GRANTING THE WRIT

I. IT IS A VIOLATION OF FUNDAMENTAL FAIRNESS AND DUE PROCESS FOR A STATE COURT TO INSTRUCT A JURY THAT IT MAY "WEIGH AND CONSIDER THE MEANING OF A SENTENCE OF IMPRISONMENT" IN ITS DETERMINATION OF GUILT OR INNOCENCE.

This Court should clarify the traditional role of the jury in a criminal case as the ultimate finder of fact of guilt or innocence under the United States Constitution, Fourteenth and Fifth Amendments.

This Court has steadfastly protected the fundamental fairness of the criminal jury trial and the presumption of innocence under the due process clause of the Fourteenth and Fifth Amendments. The bedrock principle of the presumption of innocence is that "one accused of a crime is entitled to have his guilt or innocence determined ***solely*** on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, ***or other circumstances not adduced as proof at trial.***" *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S.Ct. 1930, 1934 (1978) (emphasis added) (citing *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)).

This Court has repeatedly protected the rights of the accused in cases where trial courts have allowed "other circumstances not adduced as proof at trial" to interfere with the jury's role in determining guilt or innocence.

In *Estelle v. Williams*, the issue was whether there was a violation of an accused's constitutional rights to be tried in clothes distinctly marked as prison issue. *Estelle*, 425 U.S. at 501. In determining that this practice was unconstitutional, this Court made clear that the fundamental principle of the right to a fair trial is the presumption of innocence in favor of the accused. *Estelle*, 425 U.S. at 503. The Court admonished the judiciary to "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle*, 425 U.S. at 503. Finally, the Court stated that:

> the actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt the probability of deleterious effects on fundamental rights calls for close judicial scrutiny . . . (citations omitted) . . . Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.

Estelle, 425 U.S. at 504. Consistent with these principles, this Court held that a state violates an accused's Fourteenth

Amendment rights to a fair trial when it forces the accused to dress in identifiable prison clothes during the course of his trial. *Estelle*, 425 U.S. at 511.

Two years later, this Court reinforced its role as guardian of the accused's right to a fair trial, this time by requiring states to give a requested instruction on presumption of innocence.

In *Taylor v. Kentucky*, the Court, citing *Estelle*, repeated that the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of justice." *Taylor*, 436 U.S. at 479. Importantly, this Court made clear that the guilt or innocence of an accused should be determined "solely on the basis of the evidence introduced at trial, and ***not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced at trial***." *Taylor*, 436 U.S. at 485 (emphasis added). This Court pointed out that *Estelle v. Williams* "quite clearly relates the concept of presumption of innocence to the cognate requirements of finding guilt only on the basis of the evidence and beyond a reasonable doubt." 425 U.S. at 503 n. 11. Holding that a presumption of innocence instruction, upon request by the accused, should be read by the charging judge, this Court stated that the charge had a "purging" effect and "represent[ed] one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial." *Taylor*, 436 at 486.

Instructing a non-sentencing jury that it may "weigh and consider the meaning of a sentence of imprisonment" is as unfair as requiring the accused to wear prison garb in *Estelle*, or refusing to instruct the jury on the presumption of innocence in *Taylor*. Such an instruction has nothing to do with the facts "adduced as proof at trial." At the urging of the prosecution, the trial court interjected extraneous "circumstances not adduced as proof at trial." The "extraneous circumstances" consisted of the court's statement that a first degree murder conviction would result in at least 25 years in prison whereas a voluntary manslaughter conviction would result in not less than 3 nor more than 6 years in prison. In a hotly contested case, in which the prosecution vied for a first degree murder conviction and the defense sought voluntary manslaughter, this jury was told to consider irrelevant, unimportant, and highly prejudicial information in determining the guilt or innocence of Mr. Johnson.

More recently, this Court has specifically instructed the federal judiciary that "when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" *Shannon v. United States*, 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994). (citing *Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975)).

In *Shannon*, this Court was faced with the same issue but from the opposite side. The accused in *Shannon* actually

sought a jury instruction on the consequences of the Insanity Defense Reform Act ("IDRA"). The issue in *Shannon* was "whether federal district courts are required to instruct juries with regard to consequences of a not guilty by reason of insanity verdict." *Shannon*, 512 U.S. at 577. In finding that an instruction on the consequences of the IDRA on a not guilty by reason of insanity verdict was not required by the federal statutory scheme, this Court relied on the fact that providing the jury with extraneous information concerning the consequences of a conviction interferes with the "basic division of labor in our legal system between the judge and jury." *Shannon*, 512 U.S. at 579.

The *Shannon* court went further, laying out the reasons why a trial court should not instruct a jury on the possible consequences of a conviction :

> The principle that juries are not to consider consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's tasks. Moreover, providing jurors sentencing

> information invites them to ponder matters that are not within their province, distracts them from their fact finding responsibilities, and creates a strong possibility of confusion.

Shannon, 512 U.S. at 579. (emphasis added)

The *Shannon* Court relied, in part, on *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975). In *Rogers*, the jurors, without knowledge by counsel, asked the court during deliberations if, upon conviction, the court would sentence the accused "with extreme mercy of the court" *Rogers*, 422 U.S. at 35. The trial court answered in the affirmative. This Court found that this extraneous information was not proof "adduced at trial" and was unconstitutional. *Rogers*, 422 U.S. at 40. The Court stated that the trial court should not have answered the jurors question and that "in addition, the response should have included the admonition that the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed." *Rogers*, 422 U.S. at 40.

Here, the jury in Mr. Johnson's case was affirmatively told it could "weigh and consider" the ranges of imprisonment as part of its deliberations on guilt or innocence. The range of imprisonment was not a fact probative of guilt or innocence, nor was it a piece of evidence properly admitted at trial. Neither was it a necessary legal instruction defining the elements of any crime that Mr. Johnson was charged with. It was, instead, a significant piece of extraneous and prejudicial

information that compromised Mr. Johnson's presumption of innocence and right to a fair trial in violation of this Court's rulings in *Estelle, Taylor*, *Rogers*, and *Shannon*.

It is important to note that the "weigh and consider" instruction in the instant case was requested by the prosecution over defense counsel objection. [App. 35-36] The purpose of the prosecution's request was not to promote fairness in the trial. It was to underscore the practical implications of the two different verdicts the parties sought from the jury. Clearly the prosecution believed that if the jury knew a voluntary manslaughter conviction carried with it the potential for a minimal three-year sentence, the jury might be inclined to look with greater favor at a first degree murder conviction that carried a minimum of 25 years incarceration.

Telling the jury that a first degree murder conviction resulted in imprisonment for life and that "a defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until a defendant has served at least twenty-five (25) full calendar years of such sentence" [App. 57] allowed the jury to pick and choose its level of the homicide statute to comport with its sense of how the accused should be punished. It was a calculated effort by the state to affect the jury's thinking by giving the jury a de facto sentencing role when that role, in Tennessee, is solely the purview of the trial court.

Moreover, it is *because* the primary issue at Mr. Johnson's trial was the degree of homicide based on his

intent, as opposed to some other trial issue such as an alibi, that this instruction was so unfairly prejudicial. In attempting to discern the differences between the degrees of homicide, the jurors were unavoidably encouraged by the trial court's instruction to consider the punishments that correspond with the different degrees of homicide. Because the proof concerning intent was so close, the jury was encouraged to use the sentencing ranges to help them reach a verdict.

As this Court is aware, it is axiomatic in the federal judiciary, either on direct review or state habeas corpus review, that juries are limited to passing judgment on the guilt or innocence of a defendant without any consideration of possible penalties. *See, e.g.*, *Aliwoli v. Carter*, 225 F. 3d 826 (7th Cir. 2000) (holding that courts should withhold information about punishment from a non-sentencing jury.); *United States v. Fisher*, 10 F. 3d 115 (3rd Cir. 1993) (holding that "the jury is supposed to perform this role [finding guilt or innocence] without being influenced in any way by what the consequences of its verdict might be."); *United States v. Thomas*, 895 F. 2d 1198 (8th Cir. 1990) (holding that it is appropriate for the court to "caution the jury not to consider the possible punishment to be given a defendant."); *Pittman v. United States*, 368 F. 2d 560 (9th Cir. 1966) (holding it was proper to instruct the jury to disregard possible penalties in coming to its decision.); *Pope v. United States*, 298 F. 2d 507 (5th Cir. 1962) (holding that it was improper to advise the jury of the possible disposition of the defendant as it could draw

the jury's attention away from its chief function as sole judges of the fact.) The federal judiciary has followed this sound rule for decades.

State courts have also followed this reasoning, finding improper the practice of instructing a non-sentencing jury on the possible consequences of a conviction. *See, e.g., Brandon v. State of Florida*, 727 So. 2d 1010 (DCA Fla. 1999) (stating that, except in death penalty cases "it is improper to inform the jury of the possible penalties for the defendant's crime."); *State of Oregon v. Amini*, 963 P. 2d 65 (CA Ore. June 1998) (stating that the basic rule in Oregon is that a non-sentencing jury should not be instructed regarding the sentence that a defendant will receive if convicted); *Commonwealth v. Gunter*, 692 N. E. 2d 515 (Sup. Jud. Ct. Mass. 1998) (holding that the sentencing consequences of a verdict may not be submitted to a non-sentencing jury (citing *Commonwealth v. Ferreira*, 364 N. E. 2d 1264 (Sup. Jud. Ct. Mass. 1977)); *State of New Jersey v. Carswell*, 697 A. 2d 171 (Superior Ct of NJ July 1997)) (holding that the general rule is that non-sentencing "jurors are not to be informed as to the possible sentence of a defendant."); *People of the State of Michigan v. Torres*, 564 N. W. 2d 149 (CA Mich. 1997) (stating that it is appropriate for the court to instruct the jury that it should not consider the question of the disposition of a defendant after the verdict); *Schweitzer v. State of Indiana*, 552 N. E. 2d 454 (Ind. 1990) (stating that "it is generally inappropriate to instruct a jury on specific penal ramifications

of verdicts (citations omitted)). States have consistently followed the general rule that non-sentencing juries should not be told to consider sentencing information.

Accordingly, both federal and state jurisdictions have long-followed the rule in the American legal system that non-sentencing juries are limited to only information relevant to guilt or innocence. This Court should extend these principles of constitutional law to all state jury trials in which the jury is not used to impose sentence. The court should do so by reinforcing its guardianship of the accused's presumption of innocence and fundamental right to a fair trial under the Fourteenth Amendment to the United States Constitution by granting Mr. Johnson's petition for writ of certiorari.

CONCLUSION

For the above reasons, Mr. Johnson respectfully prays that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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App. 1

No. _____

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In The

Supreme Court of the United States

October Term, Year 2000

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HARRY D. JOHNSON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition For A Writ of Certiorari

From the Supreme Court of Tennessee

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APPENDIX

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App. 2

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE v. HARRY DAVID JOHNSON

No. E1997-00057-SC-R11-CD

ORDER

Upon consideration of the application for permission to appeal and the record before us, the application is denied.

PER CURIAM

FILED: September 11, 2000

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE
DECEMBER 1998 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	**C.C.A. No.**
	)	**03C01-9712-CR-00526**
	)	
vs.	)	**Sullivan County**
	)	
HARRY DAVID JOHNSON,	)	**Honorable R. Jerry**
	)	**Beck**
Appellant.	)	(First Degree
	)	Murder)

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OPINION FILED: May 17, 1999

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Harry David Johnson, appeals his conviction in the Sullivan County Criminal Court where a jury[6] found him guilty of the first degree murder of his wife, Katherine Trotter Johnson. The trial court sentenced him to

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[6] The jury was composed of Hamblen County residents although the trial was conducted in Sullivan County. The trial court ordered the Hamblen County jury selection in response to the defendant's motion for change of venue.

incarceration for life. In this appeal, the defendant raises the following issues:

1. the evidence of premeditation and deliberation is insufficient to support the verdict of first degree murder;

2. the trial court erred in allowing the state to cross-examine defense witnesses about the defendant's prior violent acts against the victim;

3. the trial court erred in instructing the jury about the range of punishment for the various degrees of homicide; and

4. the trial court failed to give the jury a special instruction concerning the meaning of "passion."

Upon oral argument and our review of the briefs, the record, and the law, we affirm the judgment of the trial court.

The defendant and the victim lived in an A-frame residence in a lake community on Friendship Road in Sullivan County. The defendant is a pharmacist. The couple had two daughters, Whitney Johnson and Arin Bence Johnson, ages 20 and 22, respectively, at the time of trial. By all accounts in the proof, the victim suffered from chronic alcoholism and was given to bouts of intoxication despite several efforts to control her disease through rehabilitation. She was extremely intoxicated at the time of her death.

Arin Johnson testified for the defense that on June 21, 1995, the defendant came home and had some words with the victim in the kitchen, which is located on the middle floor of the three-level home. The defendant then went to the lower level and began folding blankets where he had been sleeping

since "assault charges" were filed. Arin Johnson testified the defendant did not look like himself. His eyes looked "black," and he seemed sad, cold, distant, and depressed. His chin quivered. She had never seen him in that condition before. However, when she left to return to afternoon classes, the household was calm and there was no reason for alarm.

Later in the afternoon of June 21, Whitney Johnson went to the residence of her boyfriend, Bradley Jason Fields, and called home to tell her father that she was going to a meeting. She became upset when the defendant hung up on her. Because she was worried, she asked Fields's mother and sister to drive her home. When she arrived at the Johnson residence a half hour later, she found a note affixed to the door of the house, although she did not read it at that time. She was concerned about the welfare of the defendant, went to look for him, and found him at the rear of the house seated in a swing with a shotgun propped up against a tree nearby. She testified the defendant "wasn't the person that I knew." The defendant told her that had she not called earlier, she would have found him dead. They sat in the swing and talked for about 30 minutes. Bradley Jason Fields arrived and entered the Johnson home. Whitney Johnson joined him in the kitchen, and they began to make some tea. When they discovered they were out of sugar, the defendant drove to a store to buy sugar. When he returned, Whitney Johnson made tea, and she and Fields went to her bedroom to watch television. The defendant was in the lower level of the house.

Sometime later the defendant went from the lower level to the third floor where the victim's bedroom was located. Whitney Johnson heard "a thunk" and went upstairs to see what happened. The victim was sitting on the bedroom floor, and the defendant was sitting on the edge of the bed. The victim was "snarling" at the defendant who had the "look of a black hole type person." The defendant became enraged. He "smacked" the victim and said he was going to shoot her. He left the room very quickly and went downstairs. As he came back very quickly from the lower level with the shotgun, Whitney Johnson met him and tried to get the gun away from him. She testified the defendant was "screaming, out of control." He loaded the gun and ran upstairs to the third-floor bedroom where the victim had remained. Whitney Johnson testified that only seconds elapsed between the defendant running upstairs and the firing of a shot.

Bradley Jason Fields, who testified for the state, gave a somewhat different account of the June 21 events. He stated that the victim was intoxicated and, in his opinion, could not walk. He testified that after the defendant returned from his errand in his car, the defendant played with the family dogs for several minutes and seemed calm. However, later the defendant went upstairs and threatened to kill the victim. The defendant come down the stairs, passed Fields in the kitchen area, and proceeded to the lower level to the gun cabinet. Fields followed him down the stairs, and the defendant said, "I was going to kill that bitch." The defendant

obtained the shotgun and the box of shells and rambled about the victim not getting his money and that he was going to kill her. Fields tried to stop him, and the defendant ordered Fields out of the way. Frightened, Fields stepped back, allowing the defendant to go upstairs. Fields went to the second floor and watched and heard the confrontation from the kitchen-great room area. The bedroom opened onto a balcony which was visible through an atrium from the second-floor kitchen-great room area. Fields testified that the defendant pulled the victim off the bed onto the floor, pointed the gun at her, and told her he was going to kill her. The defendant told the victim she was not going to get his money and that he was tired of living the way he had been. Fields pleaded with him not to kill the victim. He described the defendant looking at him and saying that he had to do what he had to do. During this time, the victim was hollering Fields's name. This situation continued for about five minutes before the defendant fired the fatal shot and came running downstairs. When the defendant reached the kitchen level, he began looking for the shells which Fields had hidden under a pillow. The defendant stated "I killed her," laid the gun on a couch on the lower level, and left the house.

Fields went upstairs and discovered the victim had been shot in the head. The defendant drove off in his automobile but returned to the home a few minutes later at the same time the first law enforcement officer arrived. This officer arrested the defendant and described the defendant as

merely standing in the driveway, not crying or shaking. The officer, whose weapon was drawn, three times ordered the defendant to raise his hands before the defendant complied. The defendant spoke only to ask the officer if the officer knew who he was.

The note which Whitney Johnson initially saw affixed to the door was introduced into evidence. It was addressed to "Whit and Arin" and was signed off by "Dad." It expressed "frustrations of life in general" and stated that "I can't fix things that are unfixable. I love you both, but if there is a basement in hell, I can assure you that your mother will be firing the furnace!!" The note concluded, "I really haven't planned for this but . . . things will work out."

During Arin Johnson's direct testimony as a defense witness, she mentioned that her father had been sleeping on the lower floor "since the assault charge." Before cross-examination, the trial court conducted a jury-out hearing to rule on the state's request to be allowed to ask the witness about the assault charge. The trial court granted the state's request, and upon cross-examination, Arin Johnson testified that in May 1995 the defendant had been charged with assault against the victim. She testified that the defendant returned from jail, apologized to the family, told them it would not happen again, and then told Arin that he would kill her mother before he would go back to jail. Furthermore, Arin Johnson testified that her parents mutually drank and argued and that sometimes Arin had to physically intervene. The

defendant continued to drink in front of the victim after she had undergone rehabilitation programs and sometimes offered alcoholic beverages to the victim. Arin Johnson stated that, on the day of her mother's death, she had planned to take her mother out of the house for her safety but that the victim was in no condition to leave. On redirect examination, Arin Johnson said that the defendant had stopped talking to the daughters. "If mom was sober, then everything was fine, and if it wasn't, nobody said anything to each other." She said that as the victim's drinking got worse, the defendant's did also.

During Whitney Johnson's direct testimony as a defense witness, she stated that before the shooting the defendant was in "a rage that I have never seen before in my life." Before the state's cross-examination, the trial court held a jury-out hearing to determine the admissibility of evidence of prior acts of domestic violence that were "a part of this family," to show that the defendant's rage prior to the shooting was not unprecedented. The trial court granted the state's request, and upon cross-examination before the jury, Whitney Johnson testified that she had previously seen the defendant in a similar rage. On that occasion, the defendant had assaulted the victim, and Arin Johnson had placed the victim in Arin's car and was about to drive her to the hospital. The defendant attacked the car with a sledge hammer and broke out the car windows with Arin and her mother seated inside.

At trial, the defense conceded that the defendant shot and killed the victim but argued that the defendant was incapable of premeditation and/or deliberation. The defendant did not testify. The jury convicted him of first degree murder, and because the state had filed no notice of intent to seek the death penalty, the trial court imposed a life sentence without holding a sentencing hearing.

I. Sufficiency of the Evidence.

In the defendant's first issue, he challenges the sufficiency of the evidence to support findings of premeditation and deliberation, necessary elements of first degree murder.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In determining the sufficiency of the convicting evidence, this court does not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305,

286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the state the strongest legitimate view of the evidence contained in the record, as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this court. Id. In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), our supreme court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the state." Grace, 493 S.W.2d at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Id.

The defendant was convicted pursuant to Tennessee Code Annotated section 39-13-202(a)(1) (1991) (amended 1995) which defined first degree murder as an "intentional, premeditated and deliberate killing of another . . . ." In 1995,

the legislature amended this statute by deleting the requirement that the killing be deliberate. 1995 Tenn. Pub. Acts, Ch. 460, § 1. The amendment was effective July 1, 1995, nine days after the killing of the victim in the present case.

A homicide, once established, is presumed to be second degree murder. State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992). The state then has the burden of proving the elements of premeditation and deliberation in order to elevate the homicide to first degree murder. Id.

A premeditated act is "one done after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-201(b)(2) (1991) (amended 1995). "'Premeditation involves a previously formed design, or actual *intention* to kill.'" Brown, 836 S.W.2d at 539 (quoting Lewis v. State, 40 Tenn. 127, 147-48 (1859)) (italics added in Brown). It is the process "'of thinking about a proposed killing before engaging in the homicidal conduct.'" Id. at 541. "[N]o specific period of time need elapse between the defendant's formulation of the design to kill and the execution of that plan . . ." Id. at 543.

The pre-1995 statute also required that "the premeditated killing must also have been done deliberately, that is, with coolness and reflection." Brown, 836 S.W.2d at 539. A deliberate act is "one performed with a cool purpose." Tenn. Code Ann. § 39-13-201(b)(1) (1991) (amended 1995). The cool purpose must be formed "in the absence of passion,"

or if formed in passion, it must be committed "after the passion has subsided." State v. Bullington, 532 S.W.2d 556, 559 (Tenn. 1976). "[D]eliberation requires some period of reflection, during which the mind is 'free from the influence of excitement, or passion.'" Brown, 836 S.W.2d at 540. It is the process of weighing the wisdom of proceeding with the plan, the manner of carrying out the killing, and the consequences which may result. Id. at 541. Deliberation requires "'a cool mind that is capable of reflection.'" Id. It cannot be formed instantaneously. State v. West, 844 S.W.2d 144, 147 (Tenn. 1992); State v. Darnell, 905 S.W.2d 953, 962 (Tenn. Crim. App. 1995).

Premeditation and deliberation are separate and distinct elements, and the state is required to prove both in order to establish first degree murder. See Brown, 836 S.W.2d at 542-43; West, 844 S.W.2d at 147. These elements present questions for the jury to decide. State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). However, because these elements entail proof of a state of mind about which there may be no direct evidence, "the cases have long recognized that the necessary elements of first-degree murder may be shown by circumstantial evidence." Brown, 836 S.W.2d at 541; see also Bullington, 532 S.W.2d at 560; State v. Carter, 970 S.W.2d 509, 516 (Tenn. Crim. App. 1997). Thus, premeditation and deliberation may be inferred from the circumstances surrounding the killing. Gentry, 881

S.W.2d at 3. For instance, facts which might allow a jury to infer either premeditation or deliberation include:

(1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is planning activity;

(2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and

(3) facts about the nature of the killing from which it may be inferred that the manner of the killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995). In particular, Tennessee courts have identified some relevant circumstances:

the use of a deadly weapon upon an unarmed victim;

the fact that the killing was particularly cruel; declaration by the defendant of his intent to kill; and

the making of preparations before the killing for the purpose of concealing the crime.

State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997), cert. denied, ---- U.S. ---, 118 S.Ct. 1536 (1998).

We have reviewed a number of cases in which the defendants have challenged the sufficiency of the elements of premeditation and/or deliberation. In cases in which the appellate courts have affirmed the conviction of first degree murder, the defendant typically procured a weapon for the

purpose of killing the victim. See, e.g., State v. Bush, 942 S.W.2d 489, 501 (Tenn. 1997), cert. denied, --- U.S. ---, 118 S.Ct. 376 (1997); State v. Abrams, 935 S.W.2d 399, 401 (Tenn. 1996); State v. Bullington, 532 S.W.2d 556, 558 (Tenn. 1976); State v. Sharon Leming, No. 01C01-9704-CC-00151, slip op. at 10 (Tenn. Crim. App., Nashville, Oct. 9, 1998); State v. Steven Tolbert, No. 03C01-9707-CR-00325, slip op. at 4, (Tenn. Crim. App., Knoxville, Oct. 7, 1998), perm. app. denied (Tenn. 1999); State v. Calvin Lee Sneed, No. 03C01-9611-CR-00444, slip op. at 11 (Tenn. Crim. App., Knoxville, Jun. 12, 1998); State v. Glenn Bernard Mann, No. 02C01-9502-CC-00046, slip op. at 6 (Tenn. Crim. App., Jackson, Aug. 16, 1996), aff'd, 959 S.W.2d 503 (Tenn. 1998), cert. denied, --- U.S. ---, 118 S.Ct. 2376 (1998); State v. Kendricks, 947 S.W.2d 875, 880 (Tenn. Crim. App. 1996); see also State v. Fugate, 776 S.W.2d 541, 545 (Tenn. Crim. App. 1988). In many of these cases, a history of strife between parties was present and/or an argument or confrontation immediately preceded the fatal assault. Sharon Leming, slip op. at 5; Kendricks, 947 S.W.2d at 880; Fugate, 776 S.W.2d at 545.

Of the examined cases in which the appellate courts reversed the first degree murder conviction because premeditation or deliberation was not established, there was typically no procurement of a weapon for the purpose of killing the victim. West, 884 S.W.2d at 148; Brown, 836 S.W.2d at 543; State v. Donald Wallace, No. 01C01-9711-

CC-00526, slip op. at 10 (Tenn. Crim. App., Nashville, Sept. 30, 1998); State v. Schafer, 973 S.W.2d 269, 273 (Tenn. Crim. App. 1997); State v. Darnell, 905 S.W.2d 953, 962 (Tenn. Crim. App. 1995); State v. Bordis, 905 S.W.2d 214 (Tenn. Crim. App. 1995); cf. State v. Boyd, 909 S.W.2d 50, 55 (Tenn. Crim. App. 1995) (insufficient proof of premeditation and deliberation where defendant "reached her boiling point" with the victim's sexual harassment of her and went to her car to retrieve gun before shooting, but not killing, the victim). These cases tend to follow one of two patterns -- either there was no proof of any facts from which mental state could be inferred, or the proof established that the defendant was incapable of either premeditation or deliberation or both.

With the foregoing principles and guidelines in mind, we have carefully reviewed the evidence of the defendant's state of mind in the light most favorable to the state. This evidence is of three types: (1) the evidence of the defendant's prior statement about killing the victim before he would return to jail; (2) the note authored by the defendant; and (3) Fields's testimony about the crucial minutes before the shooting.

Fields's testimony differs from -- or at least is more specific than -- Whitney Johnson's testimony. According to Fields, the defendant threatened to kill the victim during his first visit to the bedroom that evening. The defendant said he would not allow the victim to get his money and that he was through living the way he was living. The defendant then

descended both levels to retrieve the gun and the shells from the gun cabinet. He told Fields, "I was going to kill that bitch," and he continued "rambling" over and over again that Mrs. Johnson was not going to get his money and that he would kill her. When Fields tried to intervene, the defendant threatened him and ordered him out of the way. Fields followed the defendant to the second floor where the kitchen is located but did not follow the defendant to the third floor to the victim's bedroom. As the defendant climbed the last stair flight, he again repeated that he intended to kill the victim. Fields could see up through the atrium space onto the balcony and partially through the bedroom door. He could see the defendant and the upper portion of the victim's body. He saw the defendant pull the victim off the bed onto the floor. The defendant pointed the shotgun at her and told her that he was going to kill her. Fields tried to dissuade the defendant by telling him in a loud voice that he had "two wonderful daughters to live for . . . it wasn't worth going to jail. A divorce would be easier. Everything I could think of." Fields testified that the defendant, while standing on the balcony, "would look back at me." The defendant said, in Fields's words, that the defendant "had to do what he had to do, that his daughters would be taken care of." Fields made numerous pleas, and the defendant would go "backwards and forwards," away from the bedroom and then back inside. Five minutes elapsed during Fields's pleas and the defendant's movements in and out of the bedroom. At some point, Fields realized that

the defendant "had a look in his eyes, and . . . I knew he was going to do it." As Fields started to turn away, the defendant shot the victim. He ran down the stairs, asked Fields where his shotgun shells were, and stated, "I killed her."

On appeal, both sides present plausible, formidable arguments. To be sure, the question of whether deliberation, in particular, was established beyond a reasonable doubt is a close one. However, we hold that the defendant has not carried his appellate burden and that, in the light most favorable to the state, the evidence provides bases upon which the jury could infer that the defendant deliberated by weighing the wisdom and the consequences of the homicide that he clearly intended. Certainly, the defendant was emotional, but a cool purpose "is not synonymous with a complete absence of emotion." State v. Nathan Allen Callahan, No. 03C01-9507-CC-00203, slip op. at 12 (Tenn. Crim. App., Knoxville, Apr. 24, 1997), aff'd, 979 S.W.2d 577 (Tenn. 1998). The act was not performed instantaneously after he became climatically enraged. Two people--one of them the defendant's daughter--tried to intervene and desperately pleaded with the defendant to reconsider. During a five-minute interlude, the defendant appears to have pondered the murder of his wife. Perhaps no one will ever know the defendant's true state of mind at the time he pulled the trigger. All we can require is that the state prove sufficient circumstances from which the jury can infer that the defendant premeditated and deliberated the murder beyond a

reasonable doubt. In the present case, the state met this burden. The evidence is sufficient to support the conviction of first-degree murder.

II

The defendant challenges the trial court's jury-out determinations which led to the state eliciting testimony from defense witnesses on cross-examination that the defendant (1) smashed windows in a car while the victim was seated inside, (2) committed an assault against the victim for which she obtained a warrant, and (3) said he would kill the victim before he would return to jail. The record is somewhat confusing as to the purpose of this evidence. The record of the trial court's charge conference reflects that defense counsel thought that the cross-examination was allowed in order to impeach the witnesses by contradicting their direct examination testimony. Although the trial court instructed the jury that the use of the testimony about the two assault incidents was limited to its effect on the credibility of the witnesses Arin and Whitney Johnson, the prior threat against the victim was used as substantive evidence.

The scope of cross-examination includes "any matter relevant to any issue in the case, including credibility," except that the scope is limited to the subject matter of the direct examination when the witness is an adverse party of the proponent. Tenn. R. Evid. 611(b). With this rule as a guide, the control of cross-examination is entrusted to the sound

discretion of the trial court. See State v. Gaylor, 862 S.W.2d 546 (Tenn. Crim. App. 1992).

(A)

First, we examine the cross-examination of Arin Johnson in which she testified that, after going to jail on an assault charge, the defendant said he would kill the victim before he would go to jail again. The trial court stated that such evidence was admissible as substantive evidence and did not include this evidence in the instruction on impeachment of witnesses.

In a homicide prosecution, prior threats made by the defendant against the victim are admissible to show premeditation, intent, or the state of mind of the accused. State v. Ray, 880 S.W.2d 700, 704 (Tenn. Crim. App. 1993); State v. Glebock, 616 S.W.2d 897, 905-06 (Tenn. Crim. App. 1981); Hull v. State, 553 S.W.2d 90, 93 (Tenn. Crim. App. 1977). The probative value of such evidence is high, especially in a case such as the present case where the threat was recently made and the defendant at trial challenged the presence of premeditation and deliberation. We conclude that the prior threat evidence was admissible.

(B)

The trial court instructed the jury that the purpose of the evidence about the May 1995 assault against the victim and the earlier incident of breaking the car windows was to "give . . . an explanation of the witness[es'] testimony and to test the strength or weakness of any witnesses' testimony."

The court cautioned the jury that such evidence could not be used to reflect upon the "defendant's character or action in conformity with character or trait," and the court gave a general charge on impeaching the credibility of witnesses. The court instructed the jury that "a witness may be impeached by a careful cross-examination, involving the witness in contradictory, unreasonable and improbable statements."

"The credibility of a witness may be attacked by any party . . . . " Tenn. R. Evid. 607. Though not specifically mentioned in the Rules of Evidence, impeachment by fact contradiction is well-accepted. Neil P. Cohen et al., Tennessee Law of Evidence § 607.3, at 338 (3d ed. 1995) ("The general rule is that counsel can challenge the accuracy of any relevant facts during cross-examination.")

The defendant's guilt of a May 1995 assault is suggested by Arin Johnson's testimony that he apologized and told the family it would not happen again. This testimony was in response to the prosecutor's question about Ms. Johnson's direct examination statement that the defendant had been sleeping downstairs since "the assault charges." This direct testimony was equivocal and invited exploration. The witness did not specify whether the victim had charged the defendant or *vice versa*. The defense put "the assault charges" at issue. See State v. Jones, 215 Tenn. 206, 217, 385 S.W.2d 80, 84-85 (1964) (defendant putting record at issue by testifying on direct examination that he had never been

indicted or convicted provided basis for admitting cross-examination about a prior "whisky violation"). Moreover, the elicited evidence was arguably admissible through the state's case-in-chief as substantive evidence. Glebock, 616 S.W.2d at 905-06 ("The relations existing between the victim [of a violent assault] and the defendant prior to the commission of the crime are relevant. These relations indicate hostility toward the victim and a settled purpose to harm the victim."). Certainly, the cross-examination testimony was admissible for impeachment purposes.

The evidence of the car-window breaking episode was also admissible through cross-examination. Whitney Johnson had testified that on the day of the homicide the defendant was in a rage that she had never seen before. On cross-examination, she admitted that prior to June 21, 1995, she had seen him in such a rage when he attacked Arin Johnson's car with the sledge hammer while Arin and the victim were seated inside the car. Clearly, this was fact-contradiction impeachment at work. See Lang v. State, 3 Tenn. Crim. App. 108, ---, 457 S.W.2d 882, 885 (1970). There was no error in allowing the cross-examination.

We realize that in both instances the evidence elicited on cross-examination impugns the defendant by implicating him in prior bad acts. See Tenn. R. Evid. 404(b); 608(b). However, the trial court held jury-out hearings in both instances, see Tenn. R. Evid. 404(b)(1); 608(b)(1), and gave the jury limiting instructions both as to the use of character

evidence and the limited purpose of impeachment. These precautions employed by the trial court are sufficient to protect the defendant against any incidental "bad acts" effect of impeachment through fact contradiction.

III

In the defendant's next issue, he challenges the trial court's jury instruction concerning the defendant's eligibility for parole should he be convicted of any of the various grades of homicide. The instruction was given at the state's request and was based upon Tennessee Code Annotated section 40-35-201(b) (1997) (amended 1998), as said Code section existed at the time of the trial in this case.[7] Paragraph (b)(1) of this section authorized the trial court in non-capital cases, upon request by either party, to instruct the jury on the "possible penalties for the offense charged and all lesser included offenses." Once the request is made, the trial court is required by paragraph (b)(2) to also instruct "the jury to weigh and consider the meaning of a sentence of

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[7] For all trials occurring after May 18, 1998, "the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses." 1998 Tenn. Pub. Acts ch. 1041, § 2, (amending Tenn. Code Ann. § 40-35-201(b)) (emphasis added). The trial in the present case occurred May 12-14, 1997.

imprisonment," to provide "an approximate calculation of the minimum number of years a person sentenced to imprisonment for the offense charged and lesser included offenses must serve before reaching such person's earliest release eligibility date," and to inform the jury about section 41-21-236 maximum and minimum sentence reduction credits and the governor's power to reduce prison overcrowding, where applicable. Tenn. Code Ann. § 40-35-201(b)(1), (2) (1997) (amended 1998). Paragraph (b)(2) was added to the statute in 1994. 1994 Tenn. Pub. Acts, ch. 847, §3. Prior to this amendment either party could request the "possible penalties."

In the present case, the trial court held a charge conference with counsel after the defense rested its case. In the conference, the state mentioned its request to charge the jury pursuant to Code section 40-35-201, as it existed at that time. The trial judge indicated he would charge the ranges of the offenses but would not give the jury the paragraph b(2) information. Defense counsel originally objected to any charge on penalties. When the trial judge said he would give the release eligibly time for a life sentence and would give the Range I minimum and maximum sentences for the lesser included offenses, defense counsel said there was "no reason to complicate it anymore than what it is." The defense agreed to limiting the charge to the range information as proposed by the court as a Hobson's choice between a limited charge and one that contained the formula information. Specifically, the

defendant did not waive its underlying objection to giving any charge.

The trial court then proceeded to instruct the jury that, although it would not attempt to fix any punishment, it could "weigh and consider the meaning of a sentence of imprisonment." The trial court then proceeded to inform the jury that (1) if the defendant were convicted of first degree murder, he would receive a life sentence and would be eligible for parole consideration after serving 25 years; (2) if convicted of second degree murder, the defendant's sentence would be set in a range between fifteen and 25 years; (3) if convicted of voluntary manslaughter, the defendant's sentence would be set within a range between three and six years; (4) similarly, a range of between two and four years applied to reckless homicide; and (5) a range of between one and two years applied to criminally negligent homicide. The judge instructed the jury with respect to each offense that actual release at a release eligibility date is a discretionary decision of the Board of Paroles and that the Board has the authority to require the service of the entire court-imposed sentence.

The defendant challenges the constitutionality of Code section 40-35-201(b) as it existed at the time of trial. The state argues first that the defendant has waived any objection by agreeing to the "hybrid" charge. The state also argues the issue is settled by the supreme court's decision in State v. King, 973 S.W.2d 586 (Tenn. 1997).

We agree that the defendant may have waived any claim that the "hybrid" charge is a violation of Code section 40-35-201(b), but as noted above, the defendant did not waive any claim that the statute or the given charge contravenes the state or federal constitutions. At the defendant's insistence, the trial court specifically acknowledged when it elicited the agreement on giving the hybrid charge that the defendant was not waiving his "Farris claim." See State v Farris, 535 S.W.2d 608 (Tenn. 1976) (sustaining a constitutional challenge to former Tennessee Code Annotated section 40-2707(1975), which mandated parole eligibility instructions, based upon the enactment being broader than its caption, see Tenn. const. art. II, § 7, with two members of the court finding that the enactment was unconstitutionally vague, Farris, 535 S.W.2d at 612-13).Therefore, we proceed to the heart of the issue--whether the charge given violated pertinent constitutional provisions.

In King, the defendant requested an instruction on the "possible penalties" as contemplated by Code section 40-35-201(b)(1), but he asked the trial court "to refrain from instructing the jury on parole eligibility, as required by Tenn. Code Ann. § 40-35-201(b)(2) whenever an instruction is given under (b)(1)." King, 973 S.W.2d at 587. The trial court, however, gave the full instruction as described in both paragraphs (b)(1) and (2). On appeal, King claimed that paragraph (b)(2) and the instruction given thereunder violated both the state constitutional separation of powers provisions,

Tenn. const. art. II, §§ 1, 2, and the state and federal constitutional due process provisions. U.S. const. amend 14, § 1; Tenn. const. art. I, § 8. The court held that the instruction as given in King offended no constitutional provisions. It must be recognized, however, that in King (1) the trial court instructed the jury as to a range between the shortest possible sentence (Range I) and the longest possible sentence (Range III), and (2) the trial court instructed the jury that the sentencing information was "for your information only" and disdained the "weigh and consider" formulation of paragraph (b)(2). King, 973 S.W.2d at 592.

In the present case, the trial court instructed the jury that it would not be determining the sentence, but in giving range information, the trial court used the "weigh and consider" phrase. Despite this distinction between King and the present case, we hold that the instruction given violated no constitutional provision.

First, we examine the trial court's limiting the "possible penalties" information to Range I. Although the trial court in the present case did not charge the longer punishments that accompany sentencing in Ranges II (multiple offender) and III (persistent offender), there was no realistic possibility that the defendant would be sentenced in any range higher than Range I (standard offender). In King, the supreme court approved of this court's pronouncement in State v. Smith, 926 S.W.2d 267, 271 (Tenn. Crim. App. 1995), that the jury was properly charged on the full scope of

the sentencing range running from the minimum in Range I to the maximum in Range II, the highest sentence for which Smith was eligible. King, 973 S.W.2d at 591. The jury was properly instructed when it "'was aware of the possible range of punishment that could have resulted from their verdict.'" Id. (quoting Smith, 926 S.W.2d at 271). Likewise, the jury was properly instructed in the present case even though the higher punishments in Ranges II and III were not charged. The jury was given the "possible range of punishment that could have resulted from their verdict." Id.

We now examine the effect of the charge given in the present case, including the effect of the trial court's use of the "weigh and consider" statutory language instead of the "information only" language actually used in King.

In State v. Jason M. Weiskopf, No. 02C01-9611-CR-00381 (Tenn. Crim. App., Jackson, Feb. 4, 1998) (Weiskopf I), a panel of this court found constitutional error in the use of a paragraph (b)(2) jury instruction that used the "weigh and consider" language. Our supreme court, granted Weiskopf's application for permission to appeal for the purpose of remanding the case to this court "for reconsideration in light of" King. State v. Jason M. Weiskopf (Tenn., Jackson, Nov. 2, 1998) (per curiam order). Upon reconsideration, this court held that the "weigh and consider" mandate given to the jury distinguished Weiskopf from King. State v. Jason M. Weiskopf, No. 02C01-9611-CR-00381, slip op. at 5 (Tenn.

Crim. App., Jackson, Dec. 4, 1998) (Weiskopf II), pet. for perm. app. filed (Tenn., Feb. 3, 1999).

The Weiskopf II court interpreted the due process determination in King to be limited to cases in which the "for information only" language was used, based upon the supreme court's statement that no due process violation occurred "under the circumstances." King, 973 S.W.2d at 592. The Weiskopf II court concluded "[t]here is a glaring and pivotal difference" in using one locution versus the other. Weiskopf II, slip op. at 5. In Weiskopf, a first degree murder case, the jury was instructed "that the earliest release eligibility date for first degree murder was 25 years; the earliest release eligibility date for second degree murder was 1.06 years; and the earliest release eligibility date for voluntary manslaughter was .21 years." Weiskopf II, slip op. at 4. This court said, "When a jury is told to 'weigh and consider' the meaning of a sentence in arriving at a verdict, the nature of the problem is perfectly obvious." Weiskopf II, slip op. at 6. The court held that the instruction given violated the due process provisions of both the federal and state constitutions. Id.

Although the trial court in the present case told the jury to weigh and consider the penalty information the court imparted, that information was limited to the paragraph (b)(1) information, with the exception that the trial court stated that the release eligibility date for first degree murder was 25 years. With this exception, none of the paragraph (b)(2)

information was given. We conclude that, just as Weiskopf was distinguishable from King, the present case is distinguishable from Weiskopf. The charge in the present case contained none of the paragraph (b)(2) information that would disparage the selection of lesser included offenses. We hold that, under the circumstances of the present case, the general rationale of King controls. The defendant has failed to establish that any constitutional principles invalidate the procedures used in the present case.

III

In his final issue, the defendant complains about the trial court's refusal to give to the jury the defendant's requested charge on the meaning of "passion." The requested charge says:

(a) In order for a killing to constitute murder in the first degree, the killing must be performed with a cool purpose, and the cool purpose must be formed and the deliberate intention conceived in the mind of the accused, in the absence of passion, to take the life of the person slain.

(b) "Passion" means any of the human emotions known as anger, rage, sudden resentment or fervor which renders the mind incapable of cool reflection.

The trial court acknowledged that the requested language was extracted from State v. Bullington, 532 S.W.2d 556 (Tenn. 1976); however, the court stated that the Tennessee Pattern Instruction charge would be sufficient. The trial court charged the jury as follows:

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

. . .

(3) that the killing was deliberate. A deliberate killing is one done -- one performed with cool purpose; . . . .

. . .

The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.

The defendant is entitled to a complete and correct charge of the law. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990), including the law governing the issues raised by the evidence. State v. Zirkle, 910 S.W.2d 874, 892 (Tenn. Crim. App 1995). A court commits no error by refusing a special charge if the instructions given impart a correct, full and fair statement of the applicable law. Id.

In the present case, the trial court adequately instructed the jury on the meaning of the applicable elements

of first degree murder. The charge as given explained the role of passion on the issue of deliberation. There was no need to augment the court's instruction with language that explained the common term "passion." See State v. Bennett, 798 S.W.2d 783, 790 (Tenn. Crim. App. 1990).

V

In conclusion, we find no reversible error and affirm the judgment of the trial court.

JAMES CURWOOD WITT, JR.,
Judge

CONCUR:

DAVID G. HAYES, Judge

JERRY L. SMITH, Judge

CHARGE CONFERENCE

GENERAL PERRIN: One was the windshield, one was the assault, one was the threat. And while the State would agree with the first part of the Court's instruction, that it cannot come into prove that he acted in conformity with a character trait, I believe in part the Court allowed us to introduce this under a 404 analysis in addition to cross examination because they are putting on evidence of their client's state of mind at the time, and whether he was capable of forming the intent. So relevant and substantive to that is when the statement is made "I've never seen him in a rage like that before," thus, perhaps, reducing down his culpability and his mental state of mind, it is substantive evidence to bring in where he's been in a rage in the past where he's broken out a windshield and he's broken out a car window. I think that it's not -- it's not the standard or typical situation where you have somebody that takes the stand and they've been previously convicted in the past and you use those convictions to challenge their credibility, this is actually an issue that has been -- or, excuse me, the intent has been placed in this trial as an issue that will be central to the deciding of this case.

THE COURT: Well, the defendant offered it as substantive proof.

GENERAL PERRIN: Yes, sir.

THE COURT: It was really just cross examination on that issue. Giving the jury an -- the jury issue would be whether he was in a rage or -- I'll give a charge that they can't consider those as character traits in conformity with -- I'll think about that. I'll give the character trait charge. I'll, think about the other, whether to go any further. I don't think I'm -- see, it really didn't come in like an independent State witness, there were -- it was things directly raised by the defendant's proof. But, of course, under 404 it can't be considered as a character trait. I think held be entitled to that. I may enlarge on it.

All right, any other things we need to discuss?

GENERAL PERRIN: How is Your Honor going to address the State's requested instruction on charges?

THE COURT: I've denied those.

GENERAL PERRIN: I'm not -- no, sit', I'm not -- our special -- I'm sorry, the penalties, **Your** Honor. We've requested that as a part of the instructions Your Honor gives of the penalties for the various levels of offenses be given.

THE COURT: All right. I have to compute those. Most judges now -- we started out we were trying to **give** the -- use those formulas, good and honor time and all that stuff. Most judges now, I think, are just giving the range for -- range. There's been no notice of enhancing factors.

GENERAL PERRIN: That's correct.

THE COURT: Is that correct?

GENERAL PERRIN: It is.

THE COURT: I'll probably just give the range for Range I for second degree murder. The Range, like one to ever what, rather than get into that -- we're trying to break down those percentages for prison overcrowding and all that. I think it's more confusing than anything else. Does the State ask anything further than just the -- the penalty for the range?

GENERAL PERRIN: I -- one second, please, Your Honor.

MR. NEWTON: For the record, I want to go on as saying I object to giving a charge on range of Punishment, number one.

THE COURT: All right.

MR. NEWTON: And, number two, more particularly to charging the range of punishment in that that was not the state of the law when this occurred unless triggered by the defendant.

THE COURT: I'm not -- I'm not following you, Mr. Newton.

MR. NEWTON: Judge, as I recall, back -- at least I think I recall in 195 or -- to this adoption occurred, I think a charge of range of punishment, at least at one point in time, was unique to the defendant. If he didn't request it, it wasn't given.

THE COURT I think either side could always move for it, couldn't they, as long as they did it prior to the jury selection process?

GENERAL SMITH: I believe that change occurred in 1989, Your Honor. It was in the revision of the Criminal Code.

MR. NEWTON: I don't know if my mind, goes back that far. At one time, either through tradition or whatever reason, the State never requested it, it is my understanding it was unique to the defendant. At any rate, back when this occurred the state of the law was, though, under the **Farris** decision, the Court did not, when they charged range of punishment, break down sentences into the thirty percent (30%), Range I, Standard Offender, and all those kinds of things. And pretty much it's very confusing to a jury, and it gets back, really, to what the **Farris** case says, because there's no -- they don't guarantee anyone gets out after thirty percent **(30%).** A lot of times in these cases people don't. You have advocate groups who go down and petition the Parole Board and stuff to deny parole, and, you know, I think the same problems exist now that existed for -- back when the Farris decision was made, and they were very good reasons. And I know the Court has to go with whatever the state of law is now, but the state of law changes from time to time. And I do want to go on the record as making, specifically making that objection so I can preserve that for Mr. Johnson.

THE COURT: All right. The **Farris** case came out -- the State Legislature enacted a law, I believe prior to 1982, that required the courts to charge parole eligibility, that type of thing. The **Farris** case was decided by the Tennessee Supreme Court, I can't remember the Justice that wrote it, it's one of the . . .

MR. NEWTON: Joe Henry.

THE COURT: Joe Henry. The case has the most famous quote in it, "It is trial by golly and by gee," for the jury to be given that type of information. The -- later State Legislature, after we adopted the judge sentencing instead of jury sentencing, passed a very similar statute requiring the charging of least range of punishment for defendants. Recently the Tennessee Court of Criminal Appeals, I believe, I don't think it's a Supreme Court opinion, but it is a published decision, it came out fairly recently, and distinguished the **Farris** case from present state of the law. The big point that the appellate court relied upon is that when **Farris** came out we had jury sentencing, which added an element for the jury to decide that was somewhat confusing but indicated that under the present law where we have judge sentencing that the jury does not actually sentence and it's basically for the purpose of information, and held that the charge of range of sentencing is not unconstitutional or improper. The -- I'm pretty sure that case was a Tennessee Court of Criminal Appeals decision rather than a Supreme Court decision. I

can't remember, but I think the present status of the law would entitle the State to have the range of punishment charged, and I'll overrule your objection in that regard. Now, the notice was filed prior to the beginning of jury selection, is that correct?

GENERAL PERRIN: It was. It was actually filed in the court file.

MR. NEWTON: Judge, I'll concede that, and that's not in argument.

THE COURT: All right..

MR. NEWTON: It was indeed filed prior to that and handed to me in Morristown. But I think, maybe, there was one filed even before that.

GENERAL PERRIN: We actually filed it last Thursday, but knowing that Mr. Newton-I would not receive it in the mail, we took an extra copy down.

MR. NEWTON: We don't -- there's -- there's no issue on that. I agree to that.

THE COURT: Okay. The **Goins** case indicated the -- it was a murder case I tried here about a year ago, a couple of years ago, it just came out the last few months, General Miller filed a request for range of punishment, we actually had twelve (12) jurors in the box but there hadn't been any questions asked, and they said that might have been error but it was harmless error, but the key to it is file before the jury selection process began.

MR. NEWTON: Well, we didn't -- there's no issue. We -- I would agree that it was filed prior to that.

THE COURT: All right.

MR. NEWTON: My objections go to what I just stated. I won't go back through them again, but I want to preserve that issue because you never know where these things go.

THE COURT: Okay.

GENERAL PERRIN: Your Honor, there was one question that you posed to us and I didn't ever respond to that question, as to whether we want **you** to get into the formulas or would request that you would get into the formulas in addition to the range. No, sir, we wouldn't except for on the first degree murder where you. . .

THE COURT: That's twenty-five (25) years.

GENERAL PERRIN: . . . where you tell them that is a life -- life sentence. In fact, it's not a life sentence, and we think that there should be some indication given to them that it is actually . . .

THE COURT: Well, I'm going to charge them there. Like, if this was a jury case, where the jury had the three choices, probably at that time it would have been two choices, life or death, the Court was required to charge the jury when it was -- if we had -- now we don't have a jury sentencing issue in this case because there's been no aggravators filed, so the Court will enter the sentence of life should there be a -- now, I'm going to use that language out of the TPI charge

where it says that it's twenty-five (25) years'.' I'm going to do that on the first degree murder because that's what you must serve before you're eligible for any release consideration, twenty-five (25) calendar years.

MR. NEWTON: The Court can go forward with that and say it doesn't necessarily happen.

THE COURT: All right. Well, I'll have to get that together back here. Now, you're not requesting the formulas either?

MR. NEWTON: No.

THE COURT: I'm just going to charge Range I, thirty percent (30%), ever what the.

MR. NEWTON: No, no reason to complicate it anymore than what it is.

THE COURT: All right. All right, let me go back and -- if you all could get me the **Callahan** opinion, if it's handy. I apologize, I meant to bring that up from Kingsport and just forgot it. I want to come back and make an additional finding.

GENERAL PERRIN: Will Your Honor give us a very short opportunity to do some research on the reckless homicide and criminally negligent homicide?

THE COURT: Right. I want to go want to go back -- that's the reason I'm going back, because I want to look at it.

GENERAL PERRIN: Thank you.

THE COURT: Generally I want to read -- what I want to read is **Trusty**- The new **Trusty** case. Now, it states, I believe, the **Harrison** or **Harris** rule in there, that you have to charge anything where you have to commit the lesser. In other words, it's a stair step type thing. If you have to do one, the Court has to charge it.

MR. NEWTON: Judge, there's so many TPI's out now, different versions of them, and this law is swirled around, rather than somehow mistakenly getting ahold of the wrong copy of what the Court's going to charge, could we be furnished with a copy?

THE COURT: I'll try to get my secretary to run it up.

MR. NEWTON: Not of all the charge but of the charges as to the elements.

THE COURT: Right. I'll try to get Mrs. Sims -- it may take a while. Do you all want to have that before argument?

MR. NEWTON: Yes.

GENERAL PERRIN: I -- I think -- the State would agree with Mr. Newton, that on the principle charge and any lesser included charges we need to know going into closings what the elements are going to be and how you're going to define the elements. **All** the rest of it, no, sir, we don't need.

THE COURT: Right. About the only one that's changed is first degree. We started out prior to July 1st, 195, we had the element of deliberation. . .

MR. NEWTON: Well . . .

THE COURT-. . . then we lead a change in punishment in 196, I think, where it went from twenty-five (25) year minimum to no consideration, where it came up, like, you had to serve fifty-four (54) years, or fifty-one (51) years, so this would be a twenty-five (25) year charge. The deliberation will be included. It will be the charge -- pre July 1st, 1995 charge with the element of deliberation. Do you think there's been other changes?

MR. NEWTON: No, Judge, I think it's just very critical that we have the exact charge this Court is going to give, Mr. Perrin, Mrs. Smith, myself, all the other attorneys, because there's . . .

THE COURT: Just that part?

MR. NEWTON: You could have a critical word and you -- you know, you can pick up a book -- well, you did even in this case pick up a different indictment and -- and perhaps read something differently, and I would like to have just a few minutes before we get into closing arguments to look at the Court's instruction on the elements of each offense it's going to charge . . .

THE COURT: That's fair.

MR. NEWTON: . . . so that there will be no mistake and words won't be used that are not in there.

THE COURT: All right.

MR. NEWTON: Because I hāte to get to this point and have a mistrial.

THE COURT: Now, it may take time to run all this stuff up. Ordinarily I try to have the full charge available or ninety-nine (99) . . .

GENERAL PERRIN: Your Honor, I don't -- I don't

CHARGE TO THE JURY

THE COURT: All right, after I've charged the -- okay, we're back on the record, Mr. Johnson is present with his counsel. After I've charged the jury, I want to meet with counsel. Not right then but about five or ten minutes -- take a break and I want you all to come back, I need to talk to you about something.

GENERAL PERRIN: Yes, sir.

THE COURT: After I've sent the jury back to deliberate. You don't have to rush right back, I realize you may have to -- but in about ten or fifteen minutes, if you all would come back, I would appreciate it. All right, both sides ready to bring the jury in?

GENERAL PERRIN: Yes, sir.

THE COURT: Let's bring the jury in.

(Pause)

THE COURT: It's now 2:50 p.m.

(WHEREUPON, the jury returned to open court and the following proceedings were had in its presence:)

BAILIFF GOTT: Be seated, please.

THE COURT: All right, ladies and gentlemen, at this time I will charge you the law. I'll get situated here.

State of Tennessee v. Harry David Johnson, also known as H Johnson, Criminal Court case number S37883, County of Sullivan, date, May the 14th, 1997.

Members of the Jury:

The defendant pleads not guilty to each and every offense stated or included in the indictment. It is my duty to instruct you as to applicable law. It is your duty to carefully consider each instruction equally in light of and in harmony with the others. The order in which these instructions are given is no indication of their relative importance. The indictment in this case is the formal written accusation charging the defendant with a crime. It is not evidence against the defendant and does not create any inference of guilt. You must not concern yourself with rulings on issues during the trial. Neither by such rulings, these instructions nor any other remarks which I have made, do I mean to indicate any opinion as to the facts or as to what your verdict should be. Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence. You should disregard statements which you believe are not supported by the evidence. If you have read or heard anything about the case other than in open court, you should disregard such and base your verdict only upon the law and evidence presented under the direction of the court. You are the exclusive judges of the facts in this case; you are also the exclusive judges of the law under the direction of the court. You should apply the law to the facts in deciding this case. You should consider all of the evidence in the light of your own observations and experiences in life. In addition to the offense charged, you will be instructed as to any lesser offenses which may be included by operation of law in the

offense charged. If you find the defendant not guilty of the offense charged, then you shall consider lesser included offenses in the order in which they are listed. If you find the defendant guilty of the offense charged, then you would not consider any lesser included offense. The defendant has the right to remain silent; (cough) I'm sorry,,I'm going to start over. The defendant has the right to remain silent; that is, the right not to testify. You should not consider such silence as evidence of guilt, and you can draw no inference of guilt from such silence or failure to testify. You are reminded that the State has the burden to prove guilt of any offense beyond a reasonable doubt. Any fact required to be proved may be established by direct evidence, by circumstantial evidence, or by both combined. Direct evidence is defined as evidence which directly proves a fact in issue. Direct evidence may consist of testimony of a person who has learned by the means of his or her senses the existence or non-existence of a fact in issue in the case. Circumstantial evidence is defined as evidence which does not directly prove the fact in issue but evidence from which that fact may be logically inferred. When the evidence is made up entirely of circumstantial evidence, then before you would be justified in finding the defendant guilty, you must find that all the essential facts are consistent with guilt of the accused. The facts must exclude every other reasonable theory except that of guilt so as to convince the mind beyond a reasonable doubt that the

defendant is guilty. Before a verdict of guilty is justified, these circumstances, taken together, must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a moral certainty that the defendant, and no one else, committed the offense. You are trying five (5) offenses against the defendant:

First Degree Murder
Second Degree Murder
Voluntary Manslaughter
Reckless Homicide
Criminally Negligent Homicide

You could not find the defendant guilty of more than one offense. You may, however, find the defendant not guilty of all offenses and you should so find if you have a reasonable doubt. Before you could find the defendant guilty of an offense, you must find that the State has proven beyond a reasonable doubt:

(1) each and every element of the offense, which will hereafter be defined:

(2) that the offense was committed prior to the return of the indictment; and

(3) that the offense was committed in Sullivan County, Tennessee.

If the defendant is found guilty beyond a reasonable doubt, the jury will not fix punishment, except for any offense wherein a fine is part of the punishment. In that event the jury shall fix a fine within the instructed limits. Any punishment

of imprisonment must be fixed by the trial judge and would be in addition to any fine fixed by the jury.

FIRST DEGREE MURDER (PREMEDITATED KILLING)

Any person who commits the offense of first degree murder is guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted intentionally; and

(3) that the killing was deliberate. A deliberate act is one done -- one performed with cool purpose; and

(4) that the killing was premeditated.

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result. The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally. A

premeditated act is one done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it is preceded --it is sufficient that it preceded the act, however short the interval, as long as it was the result of reflection and judgment. The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided. If you find from the proof beyond a reasonable doubt that the defendant is guilty of murder in the first degree, you will so report and your verdict in that event shall be "We, the Jury, find the defendant guilty of murder in the first degree". The punishment for the offense is life imprisonment. I need to strike something here. (Pause) I'm going to start over with that last sentence. The punishment for the offense is life imprisonment. If, however, you find the defendant not guilty of this offense, or if you have a reasonable doubt regarding his guilt, you will proceed to determine whether or

not the defendant is guilty of second degree murder, a lesser included offense.

SECOND DEGREE MURDER

Any person who commits second degree murder is guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted knowingly.

The distinction between voluntary manslaughter and second degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. Bear in mind that if you find a knowing killing with adequate provocation, that is voluntary manslaughter. "Intentionally" and "knowingly" have been defined for you previously in these instructions. The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally. If you find the defendant guilty of this offense beyond a reasonable doubt, you may fix a fine in some amount not -- not to exceed fifty thousand dollars ($50,000.00); however, you are not required to fix a fine. Any other punishment will be determined by the

Court. If you have a reasonable doubt as to the defendant's guilt of this offense, you will next consider the offense of voluntary manslaughter.

VOLUNTARY MANSLAUGHTER

Any person who commits voluntary manslaughter is guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following elements:

(1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted intentionally or knowingly; and

(3) that the killing resulted from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

The distinction between voluntary manslaughter and second degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. "Intentionally" and "knowingly" have been defined for you previously in these instructions.

If you find the -- that -- if you find the accused guilty of this offense beyond a reasonable doubt, you may fix a fine in some amount not to exceed ten thousand dollars ($10,000.00); however, you are not required to fix a fine.

Any other punishment will be determined by the Court. If, however, you find the defendant not guilty of this offense, or if you have a reasonable doubt regarding is guilt, you will proceed to determine whether or not the defendant is guilty of reckless homicide.

RECKLESS HOMICIDE

Any person who commits the offense of reckless homicide is guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant killed the alleged victim; and

(2) that the defendant acted recklessly.

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The requirement of "recklessly" is also established if it is shown that the defendant acted intentionally or knowingly.

"Intentionally" and "knowingly" have previously -- have been previously defined for you in this charge.

If you find the accused guilty of this offense beyond a reasonable doubt, you may fix a fine in some amount not to exceed five thousand dollars ($5,000.00); however, you are not required to fix a fine. Any other punishment will be determined by the Court. If, however, you find the defendant not guilty of this offense, or if you have a reasonable doubt regarding is guilt, you will proceed to determine whether or not the defendant is guilty of criminally negligent homicide.

CRIMINALLY NEGLIGENT HOMICIDE

Any person who commits criminally negligent homicide is guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant's conduct resulted in the death of the alleged victim; and

(2) that the defendant acted with criminal negligence. "Criminal negligence" means that a person acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial or unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an

ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The requirement of criminal negligence is also established if it is shown that the defendant acted intentionally, knowingly or recklessly.

The terms "intentionally," "knowingly," and "recklessly" have been previously defined for you in these instructions. If you should find the defendant is guilty beyond a reasonable doubt of criminally negligent homicide, you should so report. :You mal- fix a fine in some amount not to exceed three thousand dollars ($3,000.00); however, you are not required to fix a fine. Any other punishment would be determined by the Court.

CAUSE OF DEATH

Before the defendant can be convicted of any degree of homicide, the state must have proven beyond a reasonable doubt that the death of the deceased, Katherine Trotter Johnson, was brought about as a result of the criminal agency of the defendant; that is, that the death of the deceased was due to the unlawful act of the defendant.

One who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependent upon and rising out of the original cause.

The unlawful act need not be the sole cause of death. If an injury caused by the defendant contributed to the death, the defendant is responsible, although a subsequent mortal injury inflicted independently by another also -- by another also contributed thereto. The defendant's act or omission need not be the immediate cause of death; he is responsible if the direct cause results naturally from his conduct.

If some other circumstance caused the victims death, unrelated to the defendant's action, that would be a defense to homicide unless the circumstances -- circumstance was the natural result of the defendant's act.

There is evidence in this case that the deceased required medical attention as a result of the injuries that may have been unlawfully inflicted by the defendant, and that such

. . .

(Pause)

I'm going to start out -- start over with that paragraph. There is evidence in this case that the deceased required medical attention as a result of injuries that may have been unlawfully inflicted by the defendant. One who unlawfully and seriously injures another to the extent that medical attention is required bears the risk that improper treatment may result in death of the injured person. If the defendant unlawfully and seriously injured the deceased, he is not relieved of responsibility unless the treatment was performed in a grossly negligent and unskillful manner and unless it was the sole cause of the death.

If you find that the defendant's act, if any, did not unlawfully cause or contribute to the death of the deceased, or if you have a reasonable doubt as to this proposition, then you must find him not guilty.

RANGE OF PUNISHMENT

The jury will not attempt to fix any sentence. However, you may weigh and consider the meaning of a sentence of imprisonment. The range of punishment for the crimes involved herein is as follows:

1. If you find the defendant guilty of the offense of murder in the first degree, he shall receive a sentence of imprisonment for life. A defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least twenty-five (25) full calendar years of such sentence.

2. If you find the defendant guilty of the offense of murder in the second degree, the Court can fix a determinate sentence within a range of not less than fifteen (15) years nor more than twenty-five (25) years.

Whether a defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Parole and is based on many factors. The Board of Parole has the authority to require the defendant to serve the entire sentence imposed by the Court.

3. If you find the defendant guilty of the offense of voluntary manslaughter, the Court can fix a determinate sentence- within a range of not less than three(3) years and not more than six (6) years.

Whether the defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Parole and is based on many factors. The Board of Parole has the authority to require a defendant to serve the entire sentence imposed by the Court.

4. If you find the defendant guilty of the offense of reckless homicide, the Court can fix a determinate sentence within a range of not less than two (2) nor more than four (4) years.

Whether a defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Parole and is based on many factors. The Board of Parole has the authority to require a defendant to serve the entire sentence imposed by the Court.

5. If you find the defendant guilty of the offense of criminally negligent homicide, the Court can fix a determinate sentence within a range of not less **than** one (1) year nor more than two (2) years.

Whether the defendant is actually released from incarceration on the date when first eligible for release is a discretionary decision made by the Board of Parole and is

based on many factors. The Board of Parole has the authority to require a defendant to serve the entire sentence imposed by the Court.

EVIDENCE OF MENTAL STATE

The state must prove beyond a reasonable doubt the culpable mental state of the accused. Culpable mental state means the state of mind of the accused at the time of the offense. This means that you must consider all of the evidence to determine the state of mind of the accused at the time of the commission of the offense. The state of mind which the state must prove is contained in the elements of the offense as previously outlined in these instructions.

In this case, you have heard evidence that the defendant might have suffered from a mental condition which could have affected his capacity to form culpable form the culpable mental state required to commit a particular offense.

If you find from the evidence that the defendant's capacity to form a culpable mental state may have been affected, then you must determine beyond a reasonable doubt what the mental state of the defendant was at the time of the commission of the offense to determine of which, if any, offense he is guilty.

EXPERT WITNESS

During-the trial, you heard the expert testimony of Carlo S. Rosati, who was described to us as an expert in the

field of firearms and Dr. William McCormick, who was described to us as an expert in the field of forensic pathology. The rules of evidence provide that if scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by reason of special knowledge, skill or experience may testify and state his or her opinions concerning such matters and give reasons for his or her testimony.

Merely because an expert witness has expressed an opinion does not mean, however, that you are bound to accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the witness' background or training and experience is sufficient for the witness to give the expert opinion that you have heard. You must also decide whether the witness' opinions were based on sound reasons, judgment and information.

You are to give the testimony of an expert witness such weight and value as you think it deserves along with all the other evidence in the case.

ALLEGED PRIOR ACTS

The Court has allowed the district attorney to cross examine defense witnesses concerning alleged prior acts of the defendant, to-wit: an alleged prior assault on Kathleen --

Katherine Trotter Johnson and an event where it was stated the defendant broke a windshield of an automobile.

You should not consider the testimony concerning the alleged acts described directly above as evidence of the defendant's character or action in conformity with character or trait.

The Court allowed the district attorney to conduct a cross examination upon these alleged facts because the witnesses had raised these alleged facts in their direct testimony.

Such testimony was allowed to give the jury an explanation of the witnesses testimony and to test the strength or weakness of any witnesses' testimony -- any of the witnesses' testimony.

You are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony. If there are conflicts in the testimony of the different witnesses you must reconcile the, if you can, without hastily or rashly concluding that any witness has sworn falsely, for the law presumes that all witnesses are truthful. In forming your opinion as to the credibility of a witness, you may look to the proof, if any, of his or her general character, the evidence, if any, of the witness' reputation for truth and veracity, the intelligence and respectability of the witness, his or her interest or lack of interest in the outcome of the trial, his or her feelings, his or her apparent fairness or bias, his or her means of knowledge, the reasonableness of his or her

statements, his or her appearance and demeanor while testifying, his or her contradictory statements as to material matters, if any are shown, and all the evidence in the case tending to corroborate or to contradict him or her.

A witness may be impeached by proving that **lie** or she has made some material statements out of court which are at variance with his or her evidence on the witness stand. However, proof of such prior inconsistent statements may be considered by you only for the purpose of testing the witness, credibility and not as substantive evidence of the truth of the matter asserted in such statements. Further, a witness may be impeached by a careful cross examination, involving the witness in contradictory, unreasonable and improbable statements. Immaterial discrepancies or differences in the statements of witnesses do not affect their credibility unless it should plainly appear that some witness has willfully testified falsely.

When a witness is thus impeached, the jury has the right to disregard his or her evidence, and treat it as untrue, except where it is corroborated by other credible testimony, or by the facts and circumstances.

The state has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden never shifts but remains on the state throughout the trial of the case. The defendant is not required to prove his innocence.
The law presumes that the defendant is innocent of the charge against him. This presumption remains with the defendant

throughout every stage of the trial, and it is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

When you retire to the jury ~~room, you~~ will first select one of your members as foreperson who will preside over

your deliberations. When you have reached a verdict, you will return with it to this courtroom and your foreperson will announce it.

You can have no prejudice or sympathy, or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality as you think justice and truth dictate.

In each count, if you find that the state has proven the defendant's guilt beyond -- I'm going to start over. Just regard what I just said in that sentence.

If you find that the state has proven the defendant guilty beyond a reasonable doubt of an offense charged or included -- included, then you should find him guilty of that offense. In that event, your foreperson will report, in that count, you find the defendant "guilty," and will name the offense agreed upon.

On the other hand, if you find that the state has not proven beyond a reasonable doubt the defendant's guilt of any offense charged or included, or if you have a reasonable doubt as to his guilt, then you must find him not guilty of all offenses charged and included in that count. In that event, your foreperson will report you find the defendant "not guilty" of each offense charged and included in that count.

Now, let me fix something here.

(Pause)

General Murray-Smith, is there any special request not previously addressed by the Court, or any objections?

GENERAL SMITH: No, Your Honor.

MR. NEWTON: Mr. Newton, is there any other --any special request not previously addressed, or any objection?

MR. NEWTON: No, Your Honor.

THE COURT: All right. Take with you the indictment and the Court's written instructions. You may now consider -- retire and consider of your verdict. I'm going to hold this up; I'm going to attach the indictment.

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

T.C.A. § 40-35-201. Issue of guilt and sentence to be tried separately -- Instructing jury on possible sentences -- Parole considerations.--

(a) In all contested criminal cases, the issue of guilt or innocence is submitted to the trier of fact for a verdict on that issue alone. If the defendant is found or pleads guilty, sentence shall be set in accordance with this chapter in a separate sentencing hearing. Nothing in this chapter shall be construed to deprive a defendant of a right to a jury trial as to the defendant's guilt or innocence pursuant to Rule 23 of the Tennessee Rules of Criminal Procedure and appropriate provisions of the constitution of the United States or of Tennessee.

(b)(1) In all contested criminal cases, except for capital crimes which are governed by the procedures contained in §§ 39-13-204 and 39-13-205, upon the motion of either party, filed with the court prior to the selection of the jury, the court shall charge the possible penalties for the offense charged and all lesser included offenses.

(2)(A)(I) When a charge as to possible penalties has been requested pursuant to subdivision (b)(1), the judge shall also include in the instructions for the jury to weigh and consider the meaning of a sentence of imprisonment for the offense charged and any lesser included offenses. Such instruction shall include an approximate calculation of the minimum number of years a person sentenced to imprisonment for the offense charged and lesser included offenses must serve

before reaching such person's earliest release eligibility date. Such calculation shall include such factors as the release eligibility percentage established by § 40-35-501, maximum and minimum sentence reduction credits authorized by § 41-21-236 and the governor's power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, if applicable.

(ii) Such instructions to the jury shall also include a statement that whether a defendant is actually released from incarceration on the date when such defendant is first eligible for release is a discretionary decision made by the board of paroles based upon many factors, and that such board has the authority to require the defendant to serve the entire sentence imposed by the court.

(B) On an annual basis, the department of correction shall provide each judge exercising criminal trial court jurisdiction with the approximate calculation required in subdivision (2)(A). Such calculation shall be broken down to show the effect of each factor used in making such calculation. If the calculation provided by the department to the judges changes because of a change in the law or correctional policy, court intervention, the governor's prison overcrowding policy or any other such circumstance, the department shall send a revised calculation to the judges as such changes occur.

(c) "Plea of guilty" or "guilty plea," as used in this chapter, includes the plea of nolo contendere as provided in Rule 11 of

the Tennessee Rules of Criminal Procedure. [Acts 1989, ch. 591, § 6; 1994, ch. 847, §§ 1, 2.]